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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, et al.,

vs.

FAIRLAWN MEATS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

This brief is submitted by the AFL-CIO, firstly, because of the importance of the issue presented in this case to all

labor unions. It is submitted, secondly, because the AFL-CIO and its affiliated unions have had considerable experience with various practical aspects of the issue before the Court, which we think may be of value to the Court.

ARGUMENT

The broad issue presented in this case and in the companion case of *San Diego Building Trades Council* v. *Garmon*, No. 50 this Term, is whether the States may assume jurisdiction over cases which are within the statutory jurisdiction of the National Labor Relations Board, but which the federal Board declines in its asserted discretion to handle. We will not duplicate the legal arguments of the parties to the case on this issue, but will confine ourselves rather to discussing the practical consequences which will flow from this Court's decision.

There are at least four conceivable dispositions which the Court may make of the issue before it:

(1) It may hold that the States may occupy the area vacated by the federal Board, except that they may not restrict substantive rights conferred by the Labor-Management Relations Act, 1947.

(2) It may hold that the States may assume jurisdiction over any class or category of cases which the federal Board has announced it will not handle.

(3) It may hold that the States may assume jurisdiction only over an individual case after application has been made to the federal Board and it has refused to assume jurisdiction.

(4) It may hold that the States may not assume jurisdiction over any part of the area evacuated by the federal Board, except pursuant to a cession agreement entered into under Section 10(a) of the federal Act.

It would, of course be possible for the Court to combine (1) with either (2) or (3).

We will consider, seriatim, how each of these four possible holdings might work in practical operation.

I

State Jurisdiction: But No Deprivation of Substantive Federal Rights

We will first consider how a ruling by this Court that the States may occupy the area vacated by the federal Board, but that they may not transgress substantive rights conferred by the federal Act, might work in actual operation.

Without going into the question in detail, it clearly would be most difficult, from the standpoint of legal theory, for the Court to hold that the States are free to transgress these federal substantive rights. The Court has already held that the States may not ignore these federal rights, either on the theory that they are public rights only (*Garner* v. *Teamsters Union,* 346 U.S. 485), or because of the lack of a federal remedy (*United Mine Workers* v. *Arkansas Oak Flooring,* 351 U.S. 62).

On the other hand, a doctrine that the States may assume jurisdiction, but may not restrict substantive rights conferred by the federal Act, would encounter serious difficulties in actual operation.

Such a doctrine might be workable if the substantive federal rights were precise and clear cut, and if their existence could be determined in isolation from the adjudication of other federal issues. But such is not the case.

Section 7 of the National Labor Relations Act, which grants certain broad substantive rights to employees and their unions, is anything but precise. It reads:

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives

> of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

This general language gains specific content as it is applied on a case-by-case basis by the federal Board and the reviewing federal courts.

Further, the general language of Section 7 is conditioned and restricted by numerous other provisions of the federal Act, including particularly Section 8(b), which proscribe as unfair labor practices various types of employee and union activity which would otherwise fall within the sanction of Section 7. Section 7, for example, in general accords to employees the right to strike and picket, but those rights are subject to numerous qualifications and restrictions imposed by other sections of the Act, such as Section 8(b)(4). Thus it is quite usual for an employer to contend that particular striking or picketing is prohibited by Section 8(b)(4), while the union asserts that it is "concerted activity," the right to engage in which is protected by Section 7. As this Court said in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 478-79:

> "If this conduct does not fall within the prohibitions of §8 of the Taft-Hartley Act, it may fall within the protection of §7, as concerted activity for the purpose of mutual aid or protection."

A doctrine that the States may handle cases which are within the jurisdiction of the federal Board but which that Board declines to handle, except that the States may not prohibit conduct protected by the federal Act, would mean that in each case the state court or board would have to

interpret the general, complicated, and interrelated provisions of the federal Act, and reach a determination whether that Act sanctioned the activity in question. Conflicting and inconsistent holdings would be certain to result. As this Court said in *Garner* v. *Teamsters Union*, 346 U.S. 485, 491:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Each state court determination would present a federal question which this Court could be asked to review. In every case in which a state statute was involved and a claim to the protection of the federal Act was rejected, an appeal to this Court would lie under Title 28, Sec. 1257(2). In innumerable other cases conflicts among the state courts, and between state courts and the federal Board and the federal reviewing courts, would furnish grounds for petitions for certiorari. Either conflicting and inconsistent decisions to the point of chaos would ensue, or a heavy burden would be placed on this Court.[1]

Finally, the state courts or boards, and this Court on any review, would have to decide these issues in the absence of any decision by the National Labor Relations Board. In both the *Garner* and *Anheuser-Busch* cases this Court expressed reluctance to interpret the National Labor Relations Act save after an initial decision by the federal Board.

In sum, if the Court holds that the state courts and boards may handle cases within the federal Act but which the federal Board declines to process, we think it must and should hold that substantive federal rights conferred by the federal

[1] If the Court rules that the state courts and boards may take jurisdiction of cases which the federal Board declines to handle, questions will arise whether the federal district courts may also entertain these cases on original jurisdiction and on removal.

Act must nontheless be respected by the state agencies; and the serious practical difficulties to which that would in turn lead should weigh against a decision in favor of state jurisdiction.

II

State Jurisdiction Over Classes of Cases

We come now to consider the practical feasibility of permitting the States to assume jurisdiction over classes or categories of cases which the federal Board has announced it will not handle; without requiring that initial application be made in each individual case to the federal Board. This question is suggested but not answered by the opinion of this Court in *Building Trades Council* v. *Kinard Construction Company*, 346 U.S. 933, 74 S. Ct. 373. In reversing per curiam the Court said:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, *or that it would be futile to do so*, the Court does not pass upon the question suggested by the opinion below of whether the State court could grant its own relief should the Board decline to exercise its jurisdiction." [Italics added]

This question of permitting the States to proceed without initial resort to the federal Board arises, of course, only if the Court concludes that the States may, under some procedure, assert jurisdiction in these cases which are without the statutory jurisdiction of the federal Board but which that Board will not handle. If the decision is completely adverse to state jurisdiction, no question as to the procedure to be followed arises.

One of the justifications which has been put forward for the federal Board's adoption of general standards to govern its assertion of jurisdiction, as distinguished from proceed-

ing on a case-by-case basis, is that general standards enable the persons concerned to know in advance whether the federal Board will handle their cases. See the opinion of Member Peterson in *Breeding Transfer Company,* 110 NLRB 493, 527. If the jurisdictional standards in fact achieved this objective, so that it were possible to know in advance with fair certainty whether the Board will handle particular cases, it might be practicable (other issues apart) for the States to assume jurisdiction without requiring initial application to and turn down by the federal Board.

However, for the most part, no such degree of predictability has been achieved. On the contrary, the Board's standards for determining whether to assume jurisdiction are so complicated, and their application so uncertain, that in a large percentage of situations the parties cannot know in advance whether or not the federal Board will take jurisdiction.

A cursory examination of these jurisdictional standards will show why this is so. The Board's Nineteenth Annual Report (1954) lists, pp. 2-5, fourteen separate standards for determining whether to assert jurisdiction. Several of these standards have numerous subdivisions.

The most important of the fourteen standards is the first, which reads:

> "We have determined that in future cases the Board will assert jurisdiction—
>
> "1. [General Standards for Other-Than-Retail Establishments:] over enterprises which annually meet one or more of the following standards:
>
> (1) *Direct inflow standard:*
>
> An enterprise which receives goods or materials from out of State, valued at $500,000 or more.
>
> (2) *Direct outflow standard:*
>
> An enterprise which produces or handles goods and ships such goods out of State, or performs serv-

ices outside the State in which the enterprise is located, valued at $50,000 or more.

The enterprise itself must actually ship the goods to the out-of-State destination.

(3) *Indirect inflow standard:*

An enterprise which receives goods or materials from other enterprises in the same State which those other enterprises received from out of State, valued at $1,000,000 or more.

However, the goods must be received by the ultimate purchaser in the form in which they entered the State.

(4) *Indirect outflow standard:*

An enterprise which furnishes goods or services to other enterprises coming within subparagraph (2), above or to public utilities or transit systems, or instrumentalities or channels of commerce and their essential links, which meet the jurisdictional standards established for such enterprises; *and*

(a) Such goods or services are directly utilized in the products, services, or processes of such enterprises and are valued at $100,000 or more; *or*

(b) Such goods or services, regardless of their use, are valued at $200,000 or more.

(5) *Multistate standard:*

An establishment other than retail which is operated as an integral part of a multistate enterprise, *and*

(a) The particular establishment involved meets any of the foregoing standards; *or*

(b) The direct outflow of the entire enterprise amounts to $250,000 or more; *or*

(c) The indirect outflow of the entire enterprise amounts to $1,000,000 or more.

We have further determined that unless an employer's volume of operations meets one of the Board's new independent jurisdictional standards, we will not accumulate those standards in order to assert jurisdiction.

However, direct and indirect inflow may be added in applying the indirect inflow standard."

The captions of the other standards are:

"2. [Intrastate Links of Interstate Commerce:]
"3. [Concerns Doing National Defense Business:]
"4. [Retailing Concerns:]
"5. [Multistate Retail Chains:]
"6. [Franchised Dealers:]
"7. [Office Buildings:]
"8. [Utilities and Transit Systems:]
"9. [Newspapers:]
"10. [Taxicabs:]
"11. [Associations of Employers:]
"12. [Communications Concerns:]
"13. [Restaurants:]
"14. [Business in the Territories:]"

In addition, the Board has various other rules which it employs in determining whether to assert jurisdiction, and which it might have embodied in its "standards" but did not. For example, the Board will not take jurisdiction over hotels (*Hotel Members of Miami Beach Hotel Association*, 36 LRRM 1447 (1955)), or unions as employers (*Oregon Teamsters Security Plan Office*, 113 NLRB 987, aff'd 38 LRRM 2269 (CA DC, 1956)), or over non-profit organizations generally, with the exception of their purely commercial activities (*Lutheran Church, Missouri Synod*, 109 NLRB 859; *Armour Research Foundation of Illinois Institute of Technology*, 107 NLRB 1052; *California Institute of Technology*, 102 NLRB 1402; *Philadelphia Orchestra Association*, 97 NLRB 548; *The Trustees of Columbia University in the City of New York*, 97 NLRB 424). Again, the Board has a rule that in determining whether to take jurisdiction when secondary boycott charges are filed against a union, it will take into account the operations of all the affected employers (*International Brotherhood of Teamsters, etc., and McAllister Transfer, Inc.*, 110 NLRB 1769 (1954); *Local*

Union No. 830, Brewery and Beer Distributors Drivers, Helpers, and Platform Men, etc. (*Earl Vann*), 106 NLRB 405 (1953); *Truck Drivers Local Union No. 649, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL* (*Jamestown Builders Exchange, Inc.*), 93 NLRB 386 (1951)). It is manifest, in view of the multiplicity and complexity of these jurisdictional standards and rules, that in a great many situations employers and unions must be quite uncertain as to whether the federal Board will or will not handle their cases; and it is not surprising that the Board's jurisdictional standards have themselves become a principal subject of controversy within the Board. See e.g. *Deskins Super Market, Inc.*, 115 NLRB No. 252; *Gary Hobart Water Corp.*, 115 NLRB No. 253.

Unions and employees encounter particular difficulty in anticipating how the Board will decide jurisdictional issues, because often they do not have available to them the data which may be controlling under the "standards." A union, for example, normally cannot know whether during the preceding year a particular enterprise had an indirect inflow of goods from out of the State valued at a million dollars or more. Thus, even when it is clear which of the various jurisdictional standards applies, so that the employer may be able to determine in advance whether the Board will take jurisdiction, the union usually cannot do so.

There are indeed only two sorts of situations in which the Board's actions on jurisdiction are reasonably predictable. The first is when the employer's business is so very small that it is apparent that its operations do not meet *any* of the various dollar volume minima embodied in the standards.

The second such situation is when the Board has a fixed policy of refusing to process cases involving employers of a particular type or engaged in a particular business. The

interested parties normally have no difficulty in ascertaining whether a particular employer is a hotel or a union or a taxicab company. Here any uncertainty as to whether the Board will assert jurisdiction comes principally from the possibility that the Board may change its position. However, that likelihood may be substantial. For example, although the Board has throughout its existence refused to handle cases involving hotels, in the Miami Beach hotel dispute two of the five Board members declared that the Board should take a fresh look at this rule. (*Hotel Members of Miami Beach Hotel Association*, 36 LRRM 1447 (1955).

Again, the Board by a 3-2 vote recently refused to take jurisdiction over a union acting as an employer. *Oregon Teamsters' Security Plan Office*, 113 NLRB 987, aff'd 38 LRRM 2269 (CA DC, 1956). In the only earlier decision on this point, however, the Board did take jurisdiction over a union as an employer. *Air Line Pilots Association*, 97 NLRB 929. Since the *Oregon Teamsters'* decision was by a 3-2 vote, the general jurisdictional principle it purportedly laid down may not be immutable. Thus, even though it may be quite apparent whether an employer is a union, there is no resulting certainty as to whether or not the Board will take jurisdiction.

Again, in its 1954 jurisdictional standards the Board states that "we shall refuse to assert jurisdiction over taxicab companies." Nineteenth Annual Report, p. 5. Earlier under the 1950 standards, the Board exercised jurisdiction over taxicab companies meeting certain specifications, while before that it refused to handle taxicab companies at all. See *Checker Cab Company*, 110 NLRB 683.

Further, the 1954 jurisdictional standards in general were adopted by a 3-2 vote. If we take at face value the assertions of the Board majority that considerations of caseload and budget played a major role in the formulation of these standards (*Breeding Transfer Company*, 110 NLRB 493,

497), we must anticipate that these standards will be revised from time to time in the light of changing caseloads and appropriations. If, on the other hand, we accept the view of the dissenting members that the 1954 jurisdictional standards had their origin in the majority's "states' rights" philosophy, and were in fact politically motivated (*Breeding Transfer Company*, 110 NLRB 493, 500-505, 528); then we can expect that the standards will be revised when and if the Board acquires a different political complexion.

In deciding adversely to state jurisdiction the issue now before the Court, the Court of Appeals for the Tenth Circuit stated:

> "Unless and until there is an express ceding of jurisdiction to a proper state agency exclusive jurisdiction remains in the federal agency. For sake of order such must be true. Otherwise, *an interminable problem of determining jurisdiction would exist*, throwing needless confusion into an area clearly pre-empted by Congress." (*Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 663). [Italics added]

The same point was even more eloquently stated in *Universal Car Co.* v. *Association of Machinists*, 35 LRRM 2087, 2098 (Cir. Ct., Mich. 1954):

> "If the jurisdiction of the state courts is to depend—not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision."

The same problems which we noted earlier (*supra*, pp. 4-5) would arise if the state courts had to determine the sub-

stantive content of the federal Act, would also arise if the state courts had to decide, in advance of actual application to the federal Board, whether that Board would take jurisdiction.

Each state board or court would have to take evidence on the nature of the employer's business, its direct and indirect interstate inflow and outflow, etc., etc., and examine and interpret the federal Board's standards and the other rules and policies it employs in determining whether to assert jurisdiction. Either chaos would result or a heavy burden would be thrown on this Court of resolving the inevitable conflicts and inconsistencies. Further, in determining whether to process a particular case the federal Board is not applying a rule of law but exercising an asserted discretion. Even where an issue of law, i.e., the interpretation of the federal Act, is involved, this Court has expressed its reluctance to rule save after initial decision by the federal Board. See *supra*, p. 5. The considerations against having the state courts, and this Court on review, undertake to guess how the federal Board would exercise its discretion are even stronger.[2]

For all of these reasons, we conclude that a doctrine permitting recourse to the state courts or boards in cases within the statutory jurisdiction of the federal Board, without prior application to the latter Board, would be unworkable.

III

State Assumption of Jurisdiction After Application to Federal Board

We come now to consider the workability of a rule that

[2] It is unavoidable that the state courts, and this Court on review, must sometimes decide whether a case is within the *statutory* jurisdiction of the federal Board in the absence of an initial ruling by that Board. But that is an issue of law, rather than of discretion, and its resolution has not up until now provided any particular difficulty.

the States may assume jurisdiction over a case within the statutory jurisdiction of the federal Board only if application is first made to that Board and it refuses to exercise jurisdiction.

Two difficulties with such a procedure are set forth in the Minority Report of the Senate Committee on Labor and Public Welfare on the Smith bill (S. 2650) in 1954. As discussed at greater length, *infra*, pp. 20-22, at that time the Administration proposed to eliminate the "no-man's land" by amending the National Labor Relations Act to authorize the States to assume jurisdiction "over labor disputes over which the Board declines * * * to assert jurisdiction." The Minority Report has this to say of this proposal (Rept. 1211, 83rd Cong., 2nd Sess., Part 2, pp. 14-15):

> "We agree with the committee majority that a problem now exists with regard to the commerce jurisdiction of the Federal Board on the one hand and State agencies and courts on the other. That problem comes about because the Federal Board now has, and now exercises, discretion to decline to take cases within its jurisdiction—the power which the majority proposal would explicitly confer on the Board. When the Federal Board refuses to take a case within its jurisdiction, the State agencies or courts are nevertheless without power to take jurisdiction, since the dispute is covered by the Federal act, even though the Federal Board declines to apply the act. There is thus a hiatus—a no man's land—in which the Federal Board declines to exercise its jurisdiction and the State agencies and courts have no jurisdiction. This no man's land has been greatly enlarged in recent months by the Federal Board's increased refusal to take all sorts of cases within its jurisdiction; but some problem would exist in any event, as the Act is written.
>
> "The question, then, is how best to correct this situation. The majority would correct it by permitting the Federal Board to continue on a case-by-case basis to decide whether or not to accept jurisdiction, and would

authorize the States' agencies or courts to act in any case after the Federal Board declined to act.[3]

"It seems to us that this proposal is not satisfactory and that a better solution can be found.

"The procedure proposed is not satisfactory for at least 2 reasons:

"(1) The parties should know in advance whether their dispute is going to be decided under Federal law or State law. In no single case does a State labor relations law contain the same provisions as Taft-Hartley. If the parties do not know in advance what law governs their dispute, they cannot know how they must act in order to act lawfully.

"(2) Secondly, the procedure proposed by the majority would make for delay. Every case would have to be taken before the Federal Board first, for it to decide whether or not to take jurisdiction. That might take months or even years. Then, if the Federal Board declined to act, it would be necessary to start over before the State boards or courts.

"Let us illustrate how this would work. Suppose a union is contemplating striking a construction project. Wages and prices are rising, the existing contract is running out, and the construction project will not last much longer. Hence the union wants to strike immediately without giving the 60-day notice which is required by the Federal act but not by the State law.

"Let us suppose the union goes ahead and strikes

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[3] The Minority Report interprets the Majority proposal as requiring initial application to the federal Board in each case. The actual language of the Administration bill, quoted above, invited that interpretation. The Majority Report, however, states (Senate Rept. No. 1211, 83rd Cong., 2nd Sess., p. 19): "Thus, for example, if the Board establishes a policy that it will not assert jurisdiction in any case where the employer's dollar volume of business in interstate commerce falls below a stated figure, the States and Territories are authorized to deal with any case falling within the class excluded by the Board without waiting for the Board to decline to assert jurisdiction in the particular case coming before the State or Territorial court or agency."

when the contract runs out, without giving the 60-day notice.

"The employer can then file a charge with the NLRB. The Board will decide whether or not, in its discretion, to take the case. If it takes the case, the union will be adjudged to have been guilty of an unfair labor practice and its members will have forfeited their rights as employees under the act.

"If, on the other hand, the Federal Board declines to take the case, the employer may resort to a State board or court. However, the union will not have violated any State law, so this resort will be without avail."

That the difficulties thus foreseen by the Senate Labor Committee minority are not fanciful is demonstrated by *Fienberg Furniture Co.* v. *DiFede*, 38 LRRM 2493 (NY S. Ct. 1956). In May 1954, the union filed unfair labor practice charges with the New York State Labor Relations Board. The employer urged that its business affected interstate commerce, and that the National Board had exclusive jurisdiction; and, after considering the information on commerce submitted by the employer, the State Board dismissed, but without prejudice to refiling with it if the national Board declined to assert jurisdiction. (The New York Board follows the policy of processing cases which the federal Board has refused to handle.)

In June 1954, the union filed its charges with the national Board. The Regional Director dismissed the charge, employing a Board form letter which asserts that the case "has been carefully investigated and considered" and that "it does not appear that further proceedings are warranted inasmuch as the charge lacks merit."[4]

In the meantime, the national Board also had under consideration a petition for decertification of the union. In

[4] A similar form letter is set out in Silverberg, "How To Take A Case Before the National Labor Relations Board" (1949), p. 145.

December 1954, after several hearings at which evidence on interstate commerce was taken, the Regional Director dismissed the decertification petition. The form letter which he employed this time recites that further proceedings are not warranted "inasmuch as it would not effectuate the policies of the Act to assert jurisdiction."

In February 1955, the union refiled its unfair labor practice charges with the State Board. The employer urged that the national Board had dismissed the charges on the merits. The next six months were taken up with a series of unsuccessful efforts by the union to induce the national Board to clarify the grounds of its actions.

In December 1955, the State Board issued a complaint. The employer thereupon secured from the state supreme court a temporary injunction restraining the New York Board from proceeding pending a determination by the court of whether that Board had jurisdiction.

No further developments are thus far reported. Perhaps the union, after two years of vain effort to induce some labor board to hear its charges, has become discouraged.

As this case indicates, a doctrine authorizing the States to proceed after initial resort to and turn down by the federal Board not only insures considerable delay but encounters the difficulty that under present National Labor Relations Board practice it is often impossible to say why that Board has declined to proceed. It seems unnecessary to elaborate upon this latter point, however, since presumably the federal Board could easily clarify its procedures if this Court establishes a rule that state jurisdiction over cases within the statutory jurisdiction of the federal Board depends upon a showing that the federal Board has refused to exercise its jurisdiction.

However, even when the ground for the federal Board's dismissal of a case clearly appears, a problem will often remain of whether the Board's action was such a refusal to

exercise jurisdiction as to entitle the States to go ahead. For example, Section 10(b) of the federal Act provides:

> "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

If the charges filed with the federal Board are dismissed under this provision, are the States then to be free to act? Are they to be free to act in all cases dismissed under this provision, or only in cases where the federal Board under its jurisdictional standards would presumably have refused to act anyway? If the latter rule be adopted then the States will be faced with the difficulty discussed earlier of having to interpret the Board's jurisdictional standards, policies, etc.

Again, many unfair labor practice cases and representation proceedings are dismissed because the union is not in compliance with Section 9(f), (g) or (h) of the federal Act. Are the States to be free to process these cases?

Again, the Board, or its General Counsel, sometimes refuses to proceed on the ground that the violation has been discontinued, or was not serious. See, for example, administrative decisions of the General Counsel, Nos. K-637 and K-638, announced on September 13, 1956. Are discretionary refusals to proceed of this sort to be regarded as freeing the States to act in these cases?

In sum, there are a number of practical difficulties about permitting the States to take jurisdiction after the federal Board refused to act. It does seem to us, however, that such a rule would be more workable, or less unworkable, than permitting the States to decide initially whether the federal Board would take jurisdiction if application to it were made.

IV

No State Jurisdiction

Let us consider, finally, what effects would result from a decision by this Court that the States may not assume any part of the statutory jurisdiction of the national Board, except pursuant to a cession agreement entered into under Section 10(a) of the federal Act.

The immediate consequence of such a holding would, obviously, be a "no-man's land" in which labor relations would be unregulated. Indeed that consequence has already resulted in those States whose courts or administrative agencies have ruled against state jurisdiction.

We are not able on the basis of the information available to us to measure the extent of this incipient "no-man's land". It would encompass, as suggested in the opinions in *Breeding Transfer Company*, 110 NLRB 493, not only the area evacuated by the Board in 1954 in adopting its latest and most stringent jurisdictional standards, but also the areas earlier abandoned by it, either in its 1950 standards or before that in decisions on a case-by-case basis not to assert jurisdiction. The Board majority in *Breeding Transfer* "judges" that the Board's cumulative declinations "will affect no more than 1 percent of the employees subject to the broadest reach of the Board's legal jurisdiction". 110 NLRB at 500. If this estimate be correct, the "no-man's land" which would result from a decision here adverse to state jurisdiction would not be extensive. However, in his dissenting opinion in *Breeding Transfer* Member Murdock states (110 NLRB at 508):

> "it seems probable that at least 25 percent and perhaps as much as 33⅓ percent of our past jurisdiction is now eliminated."

We do not have the data needed to judge where the truth

lies between the conflicting estimates of the Board members as to size of the area evacuated by the federal Board. But, whatever may be the breadth of the potential "no-man's land", it obviously would be undesirable to have *any* area in which labor relations are wholly unregulated.

However, a determination by this Court that the States may not exercise the vacated jurisdiction need not create "no-man's land" of any long duration. The federal Board could and should temporarily fill the vacuum by undertaking to exercise its full statutory jurisdiction pending resolution of the issue by Congress. And there are a variety of methods of permanently eliminating any "no-man's land", among which Congress could choose.

One obvious solution would be for Congress to require the Board to exercise to the full its present statutory jurisdiction. We think that a great deal could be said in favor of this particular solution; but that of course is a matter for the Congress rather than the Court.

Two other possible solutions of the "hiatus" problem were put forward in the Senate Labor and Public Welfare Committee in 1954, when Taft-Hartley revision was last under consideration in the Congress. All members of the Senate Labor Committee, it may be noted, agreed that the "no-man's land" existed, viz., that the States could not assume jurisdiction over cases which the federal Board in its discretion declined to handle. The Administration proposal for filling this vacuum, put forward by the Republican majority of the Committee, was that the States be authorized to assume this jurisdiction. The Committee Report stated (Senate Report No. 1211, 83rd Cong., 2nd Sess., pp. 17-18):

> "During all of its long history, the Board has consistently held that it has the discretionary power to refuse to assert its jurisdiction in particular cases or

classes of cases where it has jurisdiction, if the impact on interstate commerce is remote or insubstantial.

* * * * * *

"The effect, however, of the Board's policy of refusing to assert its jurisdiction has been to create a legal vacuum or no-man's land with respect to cases over which the Board, in its discretion, has refused to assert jurisdiction. In these cases the situation seems to be that the Board will not assert jurisdiction, the States are forbidden to do so, and the injured parties are deprived of any forum in which to seek relief. In order to eliminate this legal no-man's land while affirming the Board's power to refuse to assert jurisdiction, the committee approved an amendment permitting the agencies or courts of any State or Territory to assume and assert jurisdiction in any labor dispute or class of cases over which the Board has declined to assert its own jurisdiction."

The Committee majority proposed, in other words, to *amend* the National Labor Relations Act to resolve in favor of state jurisdiction the very issue now before this Court. (S. 2650, 83rd Cong., 2nd Sess.)

As already noted, the Democratic minority of the Committee agreed that a "no man's land" existed, and that the Congress should take corrective action, but they viewed the solution proposed by the majority as unworkable. See *supra*, pp. 14-16. They urged instead:

"* * * that the jurisdiction of the federal Board be explicitly defined, that it be required to take all cases within that jurisdiction, and that all other cases be left to the jurisdiction of the State agencies and courts."[5]

Both the majority and the minority proposals failed of en-

[5] See Senate Report No. 1211; 83rd Cong., 2nd Sess., part 2, pp. 14-15.

actment when the Senate recommitted the bill to committee.[6]

Yet a fourth solution, which was proposed by Senator Ives in 1953, would be for Congress to amend Section 10(a) of the National Labor Relations Act to authorize the Board to enter into cession argreements with state agencies without regard to the restrictions now found in that section. S. 1264, 83rd Cong., 1st Sess. This solution would have the advantage that in determining whether to enter into a cession agreement the federal Board could take into account whether the particular State does or does not have a comprehensive labor relations code of its own.

That brings up the point that a very broad "no-man's land" now exists in state labor law, which is in no way attributable to the issue now before this Court. Examination of state labor laws reveals that only 12 States have labor relations codes roughly comparable in comprehensiveness to Sections 7 and 8 of the National Labor Relations Act while 12—not in all instances the same ones—make provision for the resolution of representation issues.[7]

What this means in actual practice is illustrated by the current dispute between the Hotel and Restaurant Employees' and Bartenders' International Union and the Miami Beach hotels. In 1955 the Union petitioned the National Labor Relations Board for an election among the employees of all members of the Miami Beach Hotel Association. By a vote of 3-2 the Board dismissed the case, in line with its long established Board policy of refusing to assert

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[6] Two months later the Board announced its new, more stringent, standards for exercising its jurisdiction.

[7] The following States both have labor relations codes and election machinery: Colorado, Connecticut, Kansas, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Rhode Island, Utah, Wisconsin. Michigan has a labor relations code but no election machinery, while the situation is reversed in North Dakota.

jurisdiction over hotels. *Hotel Members of Miami Beach Hotel Association*, 36 LRRM 1447. Various hotels then secured injunctions in the Florida state courts against union picketing. In these state court proceedings the question whether the union represents a majority of the employees has been in issue, but no state machinery exists for resolving the question. At one stage a chancellor did appoint a commissioner to conduct an election by secret ballot to determine whether the union represented a majority of the employees, but the Florida Supreme Court reversed, declaring that the chancellor's action "has no precedent." *Thomas Jefferson, Inc.*, v. *Hotel Employees*, 84 So. 2d 583, 37 LRRM 2338 (Fla. 1956). This "no-man's land" does not stem from any concern by the Florida Supreme Court over federal occupation of the field: the state court did not so much as advert to that issue.

Thus, the "no-man's land" which would be created by a decision by this Court in this case adverse to state jurisdiction could, and in all probability would, be promptly eliminated by the federal Board or by Congress. On the other hand, a decision in favor of state jurisdiction would actually leave many labor disputes in a partial or total "no-man's land".

CONCLUSION

In this brief *amicus* we have primarily considered the comparative feasibility of various dispositions the Court might make of the issue before it in this case.

None of the alternatives available to the Court is wholly satisfactory. On balance, however, it seems to us that a decision that the States may not assume any part of the statutory jurisdiction of the federal Board, except pursuant to a cession agreement under Section 10(a), would from a practical standpoint be the least harmful of the possible decisions. Further, any other decision would require consid-

erable torturing of the National Labor Relations Act.

A ruling that the States may not assume any part of the renounced jurisdiction would in effect leave the problem in the hands of Congress and the federal Board. We think it would be appropriate and desirable for the Court to do just that.

The issue before the Court is essentially political in its origin. It exists because: (1) in 1947, when Congress authorized the federal Board to enter into cession agreements with the state agencies, it included a proviso that the state law must be consistent with the Taft-Hartley Act; (2) no State has, quite rightly in our view, seen fit to parallel Taft-Hartley in its own labor relations law;[8] (3) Congress in 1954 rejected the Administration's proposal to authorize the States to assume jurisdiction over cases within the jurisdiction of the federal Board which that Board declines to handle; and (4) notwithstanding this action by the Congress, the federal Board proceeded with its plans to curtail substantially its exercise of jurisdiction.[9] We do not think that the Court can adequately solve the practical and political problem created by this failure of synchronization among the Congress, the States, and the federal Board; or that it should undertake to do so.

As we have shown, none of the alternative possible decisions which this Court may render are wholly, or even reasonably, satisfactory from a practical standpoint. The Court has only the power to interpret the statute Congress wrote; not the power to revise and amend it to make it

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[8] Alabama did enact a little Taft-Hartley Act for Wilcox County, Alabama; but the state Attorney General ruled it invalid under the state constitution. 26 LRRM 79.

[9] The issue now before the Court could theoretically have arisen prior to the Board's 1954 adoption of more stringent standards for asserting jurisdiction, but it never did; nor would it have possessed the practical importance that now attaches to it.

Local v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 748-750; *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266, 273, note 11; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 663, note 5.

This Court has recognized that the National Labor Relations Act does not occupy the field of labor relations to the complete exclusion of the states, but that there are areas where states may still act. *Garner* v. *Teamsters Union*, 346 U.S. 485, 488, note 4; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656; *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266. We shall demonstrate below that the instant case is an example of one such area where the states may act and that Congress has not pre-empted that area.

A. Congress, Although Aware of the Board's Jurisdictional Standards, Has Taken No Action to Disapprove Them, But on the Contrary Has Given at Least Implicit Approval to Such Standards. Accordingly, It Follows That Congress Has Not Pre-empted the Areas That Do Not Fall Within Such Standards.

In *Bethlehem Steel Co.* v. *N. Y. State Labor Relations Board*, 330 U.S. 767, 774, this Court said:

> "* * * However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, cf. Atlantic Coast Line R. Co. v. Georgia, 234 U.S. 280, 58 L. Ed. 1312, 34 S. Ct. 829, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation. Northwestern Bell Teleph.

workable. On the other hand, a number of alternatives are available to the Congress and the Board. See *supra*, pp. 20-22. In this situation, we respectfully suggest that the Court leave it to those bodies to solve the problem they created; and that the Court simply rule, in line with the plain meaning of the Act, that, absent a cession agreement complying with Section 10(a), the States may not assume any part of the statutory jurisdiction of the federal Board.

Respectfully submitted,

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Co. v. Nebraska State R. Commission, 297 U.S. 471, 80 L. Ed. 810, 56 S. Ct. 536, supra; H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 83 L. Ed. 500, 59 S. Ct. 438, supra. The states are in those cases permitted to use their police power in the interval. Terminal R. Assoc. v. Brotherhood of R. Trainmen, 318 U.S., 87 L. Ed. 571, 63 S. Ct. 420."

We submit that this fits precisely the situation presented here and that therefore state court action is permissible.

Congress, as the Courts have recognized and as Petitioners concede, has long been aware of the Board's practice to decline to assert jurisdiction in many cases that have only a small impact upon commerce so that, in view of its limited budget and personnel, the Board might devote itself to handling cases having a pronounced impact upon the flow of interstate commerce. Petitioners' Br., pp. 30-31; *Haleston Drug Stores* v. *NLRB*, 187 F.(2d) 418, 421 (C.C.A. 9), *cert. den.*, 342 U.S. 815; *Optical Workers Union* v. *NLRB*, 227 F.(2d) 687, 691 (C.C.A. 5), *reh'g. den.* 229 F.(2d) 170, *cert. den.* 351 U.S. 963; *Hearings before Joint Committee on Labor Management Relations*, 80th Cong., 2nd Sess., pp. 1121, 1155-1156, 1157-1165; *Report of Joint Committee on Labor Management Relations, S. Rept. 986*, 80th Cong., 2nd Sess., Part 3, pp. 11-13; *S. Rept. 99*, 81st Cong., 1st Sess., Part 1, p. 40; *H. Rept. 1852*, 81st Cong., 2nd Sess., p. 10; *NLRB 16th Annual Report (1952)*, pp. 15-39, 256-257. Far from disapproving the Board's practice in this regard, Congress has impliedly at least approved such practice. First, it has consistently refrained from making funds available to the Board which would permit it to handle cases not falling within its jurisdictional standards. *Hollow Tree Lumber Company*, 91 NLRB 635, 636, 26 LRRM 1543; *Breeding Transfer Co.*, 110 NLRB 493, 35 LRRM 1020. Second, affirmative indications of Congress' approval of the Board's jurisdictional standards may be found in *Hearings before Senate Committee on Labor and Public*